FILE COPY

JUN 24 19

No. 967

In the Supreme Court of the United States

OCTOBER TERM, 1958

SHERRY CORINE CORPORATION, PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
BEATE BLOCH,
Attorney,
Department of Labor, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	5
Conclusion	12

CITATIONS

Cases:

Airlines Transp. v. *Tobin*, 198 F. 2d 249	7
Alstate Construction Co. v. *Durkin*, 345 U.S. 13	5, 6
Armstrong Co. v. *Walling*, 161 F. 2d 515, affirming 68 F. Supp. 870	6
Atlantic Co. v. *Walling*, 131 F. 2d 518	6
Chapman v. *Home Ice Co. of Memphis*, 136 F. 2d 353, certiorari denied, 320 U.S. 761	6
Federal Trade Commission v. *Bunte Bros.*, 312 U.S. 349	11
Fefferman v. *Marohn*, 408 Ill. 542, 97 N.E. 2d 785	11
Hamlet Ice Co. v. *Fleming*, 127 F. 2d 165, certiorari denied, 317 U.S. 634	6
Hotels Statler Co. v. *District of Columbia*, 199 F. 2d 172	11
Kanowsky, Inc. v. *Arnold*, 250 F. 2d 47	7, 8, 9
McLeod v. *Threlkeld*, 319 U.S. 491	6, 7
Mitchell v. *Airlines Foods, Inc.*, 13 WH Cases 140	6
Mitchell v. *Kentucky Finance Company*, 359 U.S. 290	10, 11

511305—59

Cases—Continued

	Page
Mitchell v. *Royal Baking Co.*, 219 F. 2d 532	6
Overstreet v. *North Shore Corp.*, 318 U.S. 125	11
Robertson Products Co. v. *Nudelman*, 389 Ill. 281, 59 N.E. 2d 655	11
Roland Electrical Co. v. *Walling*, 326 U.S. 657	10
Southern United Ice Co. v. *Hendrix*, 153 F. 2d 689	6
Stewart-Jordan Distributing Co. v. *Tobin*, 210 F. 2d 427, certiorari denied, 347 U.S. 1013	7
Walling v. *Jacksonville Paper Co.*, 317 U.S. 564, affirming 128 F. 2d 395	7
Walling v. *Rockton & Rion R.R.*, 146 F. 2d 111, certiorari denied, 324 U.S. 880	7

Statute:

Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U.S.C. 201, *et seq.*:	
Section 3(b)	2
Section 3(n)	2, 8
Section 6	3
Section 7	3
Section 11(c)	3
Section 13(a)(2)	3, 5, 9
Section 15(a)(1)	3
Section 15(a)(2)	3

Miscellaneous:

95 Cong. Rec. 12500	9
95 Cong. Rec. 12501	9
95 Cong. Rec. 12505	10
95 Cong. Rec. 14877	8, 10
95 Cong. Rec. 14932	8, 10

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 965

SHERRY CORINE CORPORATION, PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 264 F. 2d 831. The District Court's opinion is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 13, 1959. The petition for a writ of certiorari was filed on June 1, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether employees preparing food and beverages for sale to commercial airlines to be served to their passengers en route on interstate flights are en-

gaged "in commerce" or "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether a corporation deriving between 46% and 49% of its annual gross income from such sales of food and beverages to commercial airlines can qualify for exemption from the Act as a "retail or service establishment, * * * 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry * * *."

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), in addition to those set forth on pages 2 and 3 of the petition herein, are:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.
>
> * * * * *

STATEMENT

The Secretary of Labor brought this action to enjoin the petitioner from violating the minimum wage

overtime, record-keeping and shipping provisions (Sections 6, 7, 11(c), 15(a)(1) and 15(a)(2)) of the Fair Labor Standards Act. The petitioner admitted non-compliance with these provisions (Pet. 7), contended that its employees were engaged neither "in commerce" nor in "the production of goods for commerce" under the Act, and asserted that it was in any event exempt from the Act's requirements under Section 13(a)(2) as a "retail or service establishment."

The petitioner operates a dining room and a coffee shop in the Municipal Airport Building in Norfolk, Virginia, where it employs 45 persons, including a chef, two assistant chefs, ten kitchen helpers and ten bus boys (Pet. 21).[1] In addition to serving patrons in its two restaurants, the petitioner regularly supplies food and beverages to Capital Airlines and National Airlines to be served to their passengers enroute on interstate flights leaving Norfolk. This business produces between 46% and 49% of the petitioner's annual gross revenue (*ibid.*).

Flight meals are prepared according to the airlines' specifications, at an agreed price per meal, for meal flights indicated on schedules furnished to the petitioner. The airline notifies the petitioner three hours in advance of flight time how many meals will be required, reserving a right of cancellation upon payment of half price up to one and one-half hours before departure. About one hour before flight time, the petitioner's employees prepare the requisite num-

[1] This and subsequent similar page references are to Exhibit "B" (the opinion below) of the petition for certiorari.

ber of trays. Hot foods prepared in the kitchen are placed in casserole dishes kept hot in electric ovens. The trays and ovens are delivered and put in place aboard the plane by petitioner's bus boys twenty minutes before departure. Empty ovens, carriers and equipment, all the property of the airline, are removed from the plane and cleaned in the petitioner's kitchen. The airline hostess aboard the plane serves the passengers after the plane has reached its cruising altitude. Generally, service and consumption of a meal cannot be completed until after the plane has left the state. In the case of one flight, service is not commenced until after the plane has made its first stop across the state line. The petitioner also provides coffee and fruit juices for other flights, and special cleaning service for planes from out-of-state that stay in Norfolk overnight (Pet. 21–22).

The airlines serve meals on certain first class flights without specific additional charge (Pet. 22). This practice, inaugurated to avoid the delay and expense incident to landing passengers en route for a meal, has become a competitive factor in air transportation (Pet. 22, 24, 26). The airlines do not assume a strict contractual obligation to furnish meals, but passengers have come to expect them, and sometimes when a flight is delayed meals are served to them in the petitioner's restaurant at the airport at the airline's expense (Pet. 22–23). The expense of furnishing meals to passengers is recognized as part of the cost of operation which enters into the airlines' authorized rate structure. Meal service is an important factor which distinguishes first class flights from cheaper

flights, upon which the Civil Aeronautics Board permits food to be furnished only for an additional charge (Pet. 22, 27).

The trial court dismissed the complaint, sustaining the petitioner's contention of non-coverage and its claim to exemption as a "retail or service establishment" under Section 13(a)(2) of the Act (Pet. 15–18). The Court of Appeals reversed, holding that the petitioner's kitchen employees and bus boys are engaged "in the production of goods in commerce" (Pet. 23–25), and that the sales to the airlines (which constituted in excess of the 25% tolerance for non-retail sales) were sales for resale within the meaning of the exclusion from the retail exemption of the statute (Pet. 27).

ARGUMENT

The decision below is correct; it accords with principles well settled by the decisions of this Court; and does not conflict with decisions of any other court of appeals. The holding is so limited to a particular factual situation, involving relatively few employers and employees, that we do not believe it of sufficient general significance to warrant review by this Court.

1. In holding the petitioner's employees to be engaged "in commerce or in the production of goods in commerce", the Court of Appeals applied the rule stated by this Court in *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, that employees producing goods for instrumentalities of interstate commerce are engaged in the production of goods "for commerce" within the meaning of the Fair Labor Standards Act. Even prior to *Alstate*, coverage had been consistently

sustained for employees producing ice for use by interstate railroads in icing food and beverages in dining cars as well as perishable freight (*Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied, 317 U.S. 634; *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5); *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C.A. 6); *Chapman* v. *Home Ice Co. of Memphis*, 136 F. 2d 353 (C.A. 6), certiorari denied, 320 U.S. 761),[2] and to employees of a commissary producing food and other items for sale in railroad stations and on interstate trains (*Armstrong Co.* v. *Walling*, 161 F. 2d 515 (C.A. 1), affirming 68 F. Supp. 870 (D. Mass.)). See also *Michell* v. *Airline Foods, Inc.*, 13 WH Cases 140 (E.D. La.) (not otherwise reported) (holding that the "preparation of meals to be furnished to airlines conducting flights in interstate commerce constitutes production of goods for interstate commerce"); *Michell* v. *Royal Baking Co.*, 219 F. 2d 532 (C.A. 5) (holding the Act applicable to employees of a bakery selling part of its goods to a caterer who used them to prepare flight meals for interstate airlines.)

As the Court of Appeals noted (Pet. 23), these decisions "have not been deemed at variance" with *McLeod* v. *Threlkeld*, 319 U.S. 491, which the petitioner characterizes as conflicting with the decision below (Pet. 9). *McLeod*, which held (by a closely divided Court) that an employee preparing meals for railroad maintenance-of-way workers at various points within the same state, was not engaged "in commerce" under the Act.

[2] These decisions were cited with apparent approval in *Alstate*, 345 U.S. at 16, n. 4.

is distinguishable upon several grounds. The decision there dealt only with "in commerce" coverage, not with "the production of goods for commerce," and the meals were served and consumed within the state, whereas the food and beverage prepared by the petitioner's employees actually move across state lines (Pet. 22, 24). Moreover, in *McLeod*, the food was served only for "the personal needs of the maintenance-of-way men" (319 U.S. at 497), whereas, here, as stated by the Court of Appeals, the in-flight service "not only serves the convenience of the passengers but also facilitates the interstate operations of the airlines by obviating the delays incident to the service of meals at the airport" (Pet. 24).[3]

2. The Court of Appeals correctly held the retail establishment exemption inapplicable, and its ruling is not in conflict with the decisions of any other court of appeals. Contrary to the petitioner's assertion, the Fifth Circuit's decision in *Kanowsky, Inc.* v. *Arnold*, 250 F. 2d 47, certiorari granted, May 4, 1959, is not in conflict with the decision below. While we believe *Kanowsky* erroneously applied the exemption

[3] Another independent ground of coverage exists by reason of the employees' duties in removing soiled ovens, carriers and utensils from airplanes landing from other states, in cleaning this flight equipment, and in placing it aboard airplanes departing for out-of-state points. Such handling and working on goods in the course of their interstate movement has been uniformly held to be "in commerce." See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, affirming 128 F. 2d 395 (C.A. 5); *Airlines Transp.* v. *Tobin*, 198 F. 2d 249 (C.A. 4); *Walling* v. *Rockton & Rion R.R.*, 146 F. 2d 111 (C.A. 4), certiorari denied, 324 U.S. 880; and *Stewart-Jordan Distributing Co.* v. *Tobin*, 210 F. 2d 427 (C.A. 5), certiorari denied, 347 U.S. 1013.

(see memorandum for the Secretary of Labor as *amicus curiae,* in support of petition for certiorari), it involved a factual situation (manufacture of phenolic parts for incorporation into aircraft and "resale" in such *altered* form by the producer of the aircraft assemblies)[4] differing from the situation here. The sales here would *not* qualify for exemption even under the reasoning in the *Kanowsky* case. The test used in the *Kanowsky* case, which distinguishes "wholesale" sales "in large quantity to one who intends to resell" from "retail" sales "in small quantity or direct to the

[4] *Kanowsky* apparently assumed—erroneously, we submit—that a sale in such altered form is not a "resale." The Act defines the term "resale" only in a restricted negative sense to exclude the sale of residential or farm building materials if recognized as retail (Section 3(n), *supra*, p. 2). By clear implication, sales of other property for redistribution, in original or altered form, fall within the meaning of "resale" as used in the Act. The legislative history confirms this implication. In explaining the second test of the "retail establishment" exemption, as set out above, the House Managers' Statement says:

"The second test provides that in order for an establishment to be exempt not less than 75 percent of its annual dollar volume of sales of goods or services (or of both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. *Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form.* In section 3(n) there is a special definition of the word "resale" which is applicable in the case of building materials." (95 Cong. Rec. 14932; emphasis added.)

Similarly, in explaining the meaning of the term "resale" as used in the "retail establishment" exemption provisions, the Statement of the Majority of the Senate Conferees on the Conference Report of the Amendments, as enacted, unequivocally declares that the term "is used in its ordinary sense to include resale in the same or an altered form" (95 Cong. Rec. 14877).

consumer" (250 F. 2d at 50), is entirely consistent with the decision below that the petitioner's sales of a large quantity of flight meals, for redistribution in the same and *unaltered* form to the passengers, are not retail.

The legislative history of the amendment clearly confirms this conclusion. Senator Holland, one of its sponsors, explained that the requirement that 75% of a retail establishment's sales be "not for resale" meant that "at least three-quarters of the goods or services sold must be to the ultimate consumer" (95 Cong. Rec. 12500).[1] Since the petitioner sells flight meals to the airlines "not for self-consumption but for consumption by the passengers" (Pet. 27), who pay for them as "a constituent element for the charge for transportation" (*ibid.*), such sales plainly are not "to the ultimate consumer" but are "for resale." From the point of view of the petitioner, the transaction is the same whether the re-distribution by the airlines is "complimentary" (*i.e.*, included in a higher initial ticket price) or for a specific additional charge over and above the fare.

The petitioner's argument (Pet. 12–13) that the decision below defeats the purpose of the 1949 amendment "to overcome the Administrator's 'business use' test" rests on a misconception of the amendment and confuses two separate statutory requirements. If a retail or service establishment is to qualify for exemption under Section 13(a)(2), 75%

[1] Senator Holland expressly noted that "that statement is a part of the legislative history and record, since we are offering this amendment and are sponsoring it" (95 Cong. Rec. 12501).

of its sales must be (1) "not for resale," and, *in addition,* (2) "recognized as retail sales or services in the particular industry."[6] The first requirement "not for resale" is independent of any consideration of "business use." It was the second requirement, the "industry recognition" test, which was designed to replace the "business use" test (which had been adopted by the Administrator and approved by this Court in *Roland Electrical Co.* v. *Walling,* 326 U.S. 657;[7] see *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290). Contrary to the petitioner's apparent assumption, this requirement patently does not mean that *every* sale for business use may be classified as retail.[8] The terms of the exemption, as well as the express legislative intent, plainly preclude classification of sales for

[6] The petitioner inaccurately states (Pet. 13) that the Secretary "conceded" in the Fourth Circuit that 75% of petitioner's annual dollar volume of sales is "recognized as retail sales or services in the particular industry." The Secretary's Brief to the Fourth Circuit stated (Br. 16) that since the petitioner's airline sales were so clearly for resale, defeating the exemption, it was unnecessary to discuss the evidence with respect to "industry recognition." The Reply Brief filed by the Secretary did, however, advance the additional contention that the evidence in the record was inadequate to meet the petitioner's burden of proof on "industry recognition" (Reply Br. 6–9).

[7] The petitioner inadvertently cites this Court's decision as a denial of certiorari (Pet. 13).

[8] In fact, the amendment's sponsors specifically stated that the amendment would not affect the *holding* in the *Roland* case, which involved the sale and servicing of manufacturing machinery and equipment, even though not for resale. Senator Holland, at 95 Cong. Rec. 12505; Statement of the Managers on the Part of the House, 95 Cong. Rec. 14932; Statement of the Majority of the Senate Conferees, 95 Cong. Rec. 14877.

resale as "retail," regardless of any "business use" concept.

The other decisions which the petitioner cites as in conflict with the decision below[9] all involve local retail tax statutes. Apart from their impertinence in other respects, State tax decisions, as this Court pointed out in *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 132, "are not particularly helpful in determining the scope of the [Fair Labor Standards] Act." "Translation of an implication drawn from the special aspects" of tax statutes to this "totally different statute" is particularly "treacherous business" (see *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353) in construing an exemption from this Act. The decision below correctly applied the "well-settled" principle, recently reaffirmed by this Court with respect to the specific exemption here involved, that "exemptions from the Fair Labor Standards Act are to be narrowly construed" without "straining to bring * * * activities within the literal words of the exemption" (*Mitchell* v. *Kentucky Finance Company*, 359 U.S. 290, 295–296).

---

[9] *Robertson Products Co.* v. *Nudelman*, 389 Ill. 281, 59 N.E. 2d 655; *Fefferman* v. *Marohn*, 408 Ill. 542, 97 N.E. 2d 785; and *Hotels Statler Co.* v. *District of Columbia*, 199 F. 2d 172 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
BEATE BLOCH,
Attorney, Department of Labor.

JUNE 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959